CANADIAN HUMAN RIGHTS COMMISSION
COMMISSION CANADIENNE DES DROITS DE LA PERSONNE

Canadian Human Rights Commission Policy on Alcohol and Drug Testing

Executive Summary

The *Canadian Human Rights Act* prohibits discrimination on the basis of disability and perceived disability. Disability includes those with a previous or existing dependence on alcohol or a drug. Perceived disability may include an employer's perception that a person's use of alcohol or drugs makes him or her unfit to work.

The Commission will accept complaints from employees and applicants for employment who believe they have been dismissed, disciplined or treated negatively as a result of testing positive on a drug or alcohol test. Workplace alcohol- or drug-testing policies that contain discriminatory elements may also be the subject of complaints.

Because they cannot be established as *bona fide* occupational requirements, the following types of testing are **not acceptable**:

- Pre-employment drug testing
- Pre-employment alcohol testing
- Random drug testing
- Random alcohol testing of employees in non-safety-sensitive positions.

The following types of testing **may be included** in a workplace drug- and alcohol-testing program, but only if an employer can demonstrate that they are *bona fide* occupational requirements:

- Random alcohol testing of employees in safety-sensitive positions.[1] Alcohol testing has been found to be a reasonable requirement because alcohol testing can indicate actual impairment of ability to perform or fulfill the essential duties or requirements of the job. Random drug testing is prohibited because, given its technical limitations, drug testing can only detect the presence of drugs and not if

[1]A safety-sensitive job is one in which incapacity due to drug or alcohol impairment could result in direct and significant risk of injury to the employee, others or the environment. Whether a job can be categorized as safety-sensitive must be considered within the context of the industry, the particular workplace, and an employee's direct involvement in a high-risk operation. Any definition must take into account the role of properly trained supervisors and the checks and balances present in the workplace.

or when an employee may have been impaired by drug use.

- Drug or alcohol testing for "reasonable cause" or "post-accident," e.g. where there are reasonable grounds to believe there is an underlying problem of substance abuse or where an accident has occurred due to impairment from drugs or alcohol, provided that testing is a part of a broader program of medical assessment, monitoring and support.
- Periodic or random testing following disclosure of a current drug or alcohol dependency or abuse problem may be acceptable if tailored to individual circumstances and as part of a broader program of monitoring and support. Usually, a designated rehabilitation provider will determine whether follow-up testing is necessary for a particular individual.
- Mandatory disclosure of present or past drug or alcohol dependency or abuse may be permissible for employees holding safety-sensitive positions, within certain limits, and in concert with accommodation measures. Generally, employees not in safety-sensitive positions should not be required to disclose past alcohol or drug problems.

In the limited circumstances where testing is justified, employees who test positive must be accommodated to the point of undue hardship. The *Canadian Human Rights Act* requires individualized or personalized accommodation measures. Policies that result in the employee's automatic loss of employment, reassignment, or that impose inflexible reinstatement conditions without regard for personal circumstances are unlikely to meet this requirement. Accommodation should include the necessary support to permit the employee to undergo treatment or a rehabilitation program, and consideration of sanctions less severe than dismissal.

The employer will be relieved of the duty to accommodate the individual needs of the alcohol- or drug-dependent employee only if the employer can show that:

1. the cost of accommodation would alter the nature or affect the viability of the enterprise, OR

2. notwithstanding the accommodation efforts, health or safety risks to workers or members of the public are so serious that they outweigh the benefits of providing individualized accommodation or consideration to a worker with an addiction or dependency problem.

The Commission supports the use of methods other than drug and alcohol testing for dealing with employee impairment. Awareness, education, rehabilitation, and effective interventions such as enhanced supervision and peer monitoring are the most effective ways of ensuring that performance issues associated with alcohol and drug use are detected and resolved.

Cross-Border Trucking and Busing

For companies that drive exclusively or predominantly between Canada and the U.S., not being banned from driving in the U.S. may be a *bona fide* occupational requirement, provided there is evidence that the continued employment of banned drivers would constitute an undue hardship to the employer.

Drivers denied employment opportunities or who face disciplinary or other discriminatory employment consequences in Canada as a result of the imposition of the U.S. rules have a right to file a complaint with the Canadian Human Rights Commission on the ground of real or perceived disability. Drivers who test positive must be professionally assessed and must be accommodated by their employer in accordance with Canadian law and jurisprudence. Accommodation might include alternative employment within the company, and/or treatment and rehabilitation. After treatment and rehabilitation, drivers could be reassigned to Canada-only routes, unless doing so would constitute an undue hardship to the employer.

Canadian Human Rights Commission Policy on Alcohol and Drug Testing

Introduction

The Commission recognizes that inappropriate use of alcohol or drugs can have serious adverse effects on a person's health, safety and job performance. Safety is a prime consideration for employees and employers; however the need to ensure safety must be balanced against the requirement that employees not be discriminated against on the basis of a prohibited ground of discrimination. Workplace rules and standards that have no demonstrable relationship to job safety and performance have been found to be in violation of an employee's human rights.

In the Commission's view, drug testing is generally not acceptable, because it does not assess the effect of drug use on performance. Available drug tests do not measure impairment, how much was used or when it was used. They can only accurately determine past drug exposure. Therefore, a drug test is not a reliable means of determining whether a person is — or is not — capable of performing the essential requirements or duties of their position. That said, alcohol testing may be acceptable in some cases, because a properly administered breathalyser is a minimally intrusive and accurate measure of both consumption of alcohol and actual impairment.

If impairment is a concern in the workplace, whether from stress and anxiety, fatigue or substance abuse, an employer should focus on ways of identifying potential safety risks and remedying them, rather than taking a punitive approach to this issue. Awareness, education, effective interventions and rehabilitation are the most effective ways of ensuring that performance issues associated with alcohol and drug use are detected and resolved. An employer should consider adopting comprehensive workplace health policies that may include employee assistance programs, drug education and health promotion programs, off-site counselling and referral services, peer or supervisor monitoring.

Policy Objective

The object of this policy is to set out the Commission's interpretation of the human rights limits on drug- and alcohol-testing programs, as well as provide practical guidance on compliance with the *Canadian Human Rights Act*. This policy was developed following a public consultation and after studying Canadian human rights law. The Commission will apply its policies in the enforcement and interpretation of the Act.

This policy is not a substitute for legal advice and any employer considering a drug- and alcohol-testing policy should seek legal guidance on this issue.

General Policy Statement

Requiring an employee or applicant of employment to undergo a drug test as a condition of employment will, in most cases, be considered a discriminatory practice on the ground of disability. Individuals who believe they have been treated unfavourably, lose or are denied employment as a result of testing positively for past drug use, may file a complaint under the *Canadian Human Rights Act*.

Given that alcohol testing can measure impairment, alcohol testing of employees in safety-sensitive positions may be acceptable, although the employer must accommodate the needs of those who test positive.

Guiding Principles

Legal Framework

Recent decisions of the Supreme Court of Canada[2] and the Ontario Court of Appeal[3] have put into question whether drug testing, such as pre-employment and random testing, even for employees in safety-sensitive positions,[4] can ever be justified. These decisions were, in part, the impetus for the Commission's decision to update its policy on drug testing and to provide a framework for the issue of alcohol testing in the workplace.

The *Canadian Human Rights Act* prohibits discrimination on the basis of disability and perceived disability. Disability includes those with a previous or existing dependence on

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[2] *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union)*, [1999] 3 S.C.R.3., also referred to as the *Meiorin* case.

[3] *Entrop v. Imperial Oil* (2000) 50 O.R. 3d 18 (C.A.)

[4] A safety-sensitive job is one in which incapacity due to drug or alcohol impairment could result in direct and significant risk of injury to the employee, others or the environment. Whether a job can be categorized as safety-sensitive must be considered within the context of the industry, the particular workplace and an employee's direct involvement in a high risk operation. Any definition must take into account the role of properly trained supervisors and the checks and balances present in the workplace.

alcohol or a drug. Perceived disability may include an employer's perception that a person's use of alcohol or drugs makes him or her unfit to work.

In accordance with current case law on the issue of drug and alcohol testing,[5] and consistent with the Act's prohibition of discrimination on the ground of real or perceived disability, drug- and alcohol-testing policies are *prima facie* discriminatory — not only against drug- and alcohol-dependent persons, but also against all drug and alcohol users who are subject to adverse consequences as a result of detection of such use. Under the *Canadian Human Rights Act*, the issue is not whether an individual is a dependent or casual drug or alcohol user, but rather how such a person is treated by the employer. For example, testing programs may be used to deny employment to those who test positive, label a person as drug- or alcohol-dependent and impose employment conditions on those persons. Even when programs are rehabilitative in nature, such programs negatively affect employment opportunities, thus triggering the protection of the Act.

The *bona fide* occupational requirement (BFOR) is the most common defence raised by employers against allegations of employment discrimination. In the *Meiorin*[6] case, the Supreme Court of Canada set out a new test for determining whether an employer has established a BFOR and satisfied the duty of accommodation short of undue hardship. Under the test, the following questions must be asked:

1. Did the employer adopt the policy or standard for a purpose rationally connected to the performance of the job?

2. Did the employer adopt the particular policy or standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate, work-related purpose?

3. Is the policy or standard reasonably necessary to the accomplishment of that legitimate, work-related purpose?

This last element requires the employer to show that the policy or standard adopted is the least discriminatory way to achieve the purpose or goal in relation to the particular jobs to which the policy or standard applies. It includes the requirement for the employer to demonstrate that it is impossible to accommodate individual employees without imposing undue hardship. (See section on Accommodation and Undue Hardship.)

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[5] *Entrop v. Imperial Oil* (2000) 50 O.R. 3d 18 (C.A.)

[6] *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union)*, [1999] 3 S.C.R.3.

As a result of the *Meiorin* decision, the Commission has modified its approach to the investigation of complaints related to employment standards. All allegedly discriminatory standards and policies must be justified as rationally connected to the work or service, made in good faith, and reasonably necessary. Investigations now also consider whether the standard has the effect of excluding on impressionistic assumptions members of a particular group, or treating one or more groups more harshly than others without apparent justification. The onus is on the respondent (i.e. the employer) to provide evidence of each of the elements of the test set out by the Court.

Legal Decisions on Alcohol and Drug Testing

In *Entrop v. Imperial Oil*,[7] the Ontario Court of Appeal had an opportunity to apply the *Meiorin* test to the issue of drug and alcohol testing. The case involved an employee of Imperial Oil who was compelled under company policy to reveal a past drinking problem. The employee, Martin Entrop, was subsequently removed from his position in a "safety-sensitive" area, despite the fact that he had been alcohol-free for several years. Mr. Entrop then filed a complaint with the Ontario Human Rights Commission. His complaint triggered an analysis of drug- and alcohol-testing policies in the workplace that went all the way to the Ontario Court of Appeal

First, the Court of Appeal concluded that alcohol and drug testing is *prima facie* discriminatory. It then applied the test developed by the Supreme Court in *Meiorin* to determine whether, and in what circumstances, drug and alcohol tests may be justified as *bona fide* occupational requirements. The Court concluded that Imperial Oil had satisfied the first two steps of the test set out by the Supreme Court: rational connection and honest and good faith belief.

In considering the third branch of the test, the Court first noted a critical difference between alcohol and drug tests. Alcohol tests, i.e. a breathalyser, can test whether a person is actually impaired at the moment the test is administered. That is, an alcohol test, if applied to a person on the job, can tell whether that person is fit to do his or her job. On the other hand, the Court noted drug tests, such as urinalysis, cannot measure whether a person is under the effect of a drug at the time the test is administered. A drug test can only detect past drug use. An employer who administers a drug test cannot tell whether that person is impaired at the moment, nor whether they are likely to be impaired while on the job.

With this distinction established, the Court considered alcohol or drug tests in various circumstances. For example, the Court concluded that random alcohol testing of employees was permissible for employees in safety-sensitive positions. In the opinion

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[7](2000) 50 O.R. 3d 18 (C.A.)

of the Court, employers can legitimately take steps to detect alcohol impairment among its employees in safety-sensitive positions, where supervision is limited or non-existent.

In his comments on drug testing, Justice Laskin reasoned that, because drug testing cannot measure present impairment, future impairment or likely impairment on the job, Imperial Oil could not justify pre-employment testing or random drug testing for employees in safety-sensitive (or other) positions as reasonably necessary to accomplish Imperial Oil's legitimate goal of a safe workplace, free from impairment (the third branch of the Supreme Court test). Further, the Ontario Court of Appeal found drug-testing programs had not been shown to be effective in reducing drug use, work accidents or work performance problems.

The Court held that drug testing for "reasonable cause" or "post-accident" and post-reinstatement, may be acceptable if "...necessary as one facet of a larger process of assessment of drug abuse." Neither the tribunal nor the courts elaborated on what larger process of assessment is required.

The Court also concluded that Imperial Oil's sanction for a positive test by an employee in a safety-sensitive position — dismissal — was not sufficiently sensitive to individual capabilities.

Based on this decision, it would appear that if an employer seeks to introduce random drug testing into the workplace, it will only be successful if there is drug-testing technology that can demonstrate a current state of impairment, as a breathalyser can demonstrate alcohol impairment.

The *Entrop* decision is final and will not be appealed. It will bind arbitrators and tribunals in Ontario in the future, and will be highly persuasive in proceedings in other provinces and territories.

Application

Pre-employment Drug and Alcohol Testing

Testing for alcohol or drugs is a form of medical examination. Any employment related medical examination or inquiry must be limited to determining an individual's ability to perform the essential duties of the job. An employer must therefore demonstrate that pre-employment drug and alcohol testing provides an effective assessment of an applicant's ability to discharge their employment responsibilities. Since a positive pre-employment drug or alcohol test will in no way predict whether the individual will be impaired at any time while on the job, pre-employment testing cannot be shown to be reasonably necessary to accomplish the legitimate goal of hiring non-impaired workers. Pre-employment drug and alcohol testing fails the "reasonable necessity" arm of the *Meiorin* test and is contrary to the Act.

It is also the Commission's position that conducting automatic drug and alcohol tests as part of a medical assessment for certification contravenes the spirit of the *Canadian Human Rights Act*. Testing as a pre-condition or certification for employment in a safety-sensitive position should only occur in limited circumstances, such as where the individual has disclosed an existing or past drug abuse problem or where a general medical exam provides reasonable cause to believe that an individual may become impaired while on the job.

Random Testing for Drugs and Alcohol

Random drug testing, whether an employee holds a safety-sensitive position or not, is contrary to the *Canadian Human Rights Act*, because it fails the "reasonable necessity" test. Since a positive drug test cannot measure present impairment and can only confirm that a person has been exposed to drugs at some point in the past (sometimes as much as several weeks in the past), it cannot identify whether a person was impaired while on the job. Random drug tests therefore cannot be shown to be reasonably necessary to accomplish the goal of ensuring that workers are not impaired by drugs.

As long as employees are notified that alcohol testing is a condition of employment, random alcohol testing of employees in safety-sensitive positions may be permissible, although the employer must meet the duty to accommodate the needs of those who test positive. Random alcohol testing can pass the *Meiorin* test, where random drug testing does not, because a breathalyser reading can identify whether or not a person is impaired while on the job.

Random alcohol testing of an employee in a non-safety-sensitive position is not acceptable. Unless an employer has reasonable cause to believe the employee is unfit to do his or her job as a result of alcohol use (addressed below), an employer cannot demonstrate that it is reasonably necessary to administer breathalyser tests to ensure effective job performance.

Given that the focus is on testing for impairment of one's ability to perform the essential duties of a position, zero tolerance for alcohol no matter when consumed will generally be considered unnecessarily strict.

"Reasonable Cause" and "Post-Incident" Drug and Alcohol Testing

"Reasonable cause" or "post-incident" testing, for either alcohol or drugs, in a safety-sensitive environment may be acceptable in specific circumstances. For example, where an employee reports to work in an unfit condition and there are reasonable grounds to believe there is an underlying problem of substance abuse, or following an accident, a near miss or report of dangerous behaviour, an employer will have a legitimate interest in assessing whether an employee has used substances that may

have contributed to the incident. An employer can generally establish that "reasonable cause" and "post-incident" testing is reasonably necessary to ensure the heightened safety standard that is necessary in risk-sensitive environments, if testing is part of a broader program of medical assessment, monitoring and support.

"Reasonable cause" and "post-incident" testing, if justified, should be conducted as soon as reasonably practical, but not where there is evidence that the act or omission of the employee could not have been a contributing factor to the accident (e.g. structural or mechanical failure).

In rare cases, dismissal or permanent re-assignment will be warranted for a positive test result but, in reaching such a decision, employers must bear in mind the general rule of individualized consideration to the point of undue hardship.

"Reasonable cause" and "post-incident" drug and alcohol testing of employees in non-safety-sensitive positions has not been an issue that has come before the courts. It may be that an employer could establish such testing was a BFOR, if it were successful in meeting the "reasonable necessity" arm of the *Meiorin* test. That is, an employer would have to show that, in a particular employee's case, the circumstances were such that no other means were possible, short of undue hardship to the employer, to ensure the accomplishment of a legitimate objective such as workplace safety. For office workers in regular contact with co-workers and supervisors, proving such a case would be difficult, but not inconceivable. Testing should only be considered if an employee's on-the-job behaviour provides reasonable grounds to believe he or she is impaired by drugs or alcohol.

Mandatory Disclosure

In *Entrop*, the Ontario Court of Appeal accepted that an employer could impose a work rule that requires employees working in a safety-sensitive position to disclose current substance abuse problems, as well past problems with alcohol or drugs (within the last 5 or 6 years for alcohol dependancy and 6 years for drug dependency, the point where the risk of relapse is "no greater than the risk a member of the general population will suffer a substance abuse problem.")

Automatic dismissal or refusal to employ an individual based on a disclosure of past or present dependency on drugs or alcohol is not in keeping with the requirement by the employer under the *Canadian Human Rights Act* to provide accommodation to the point of undue hardship. Failure to disclose an alcohol or drug problem should also not be grounds for dismissal as denial is a symptom of addiction.

Generally, employees in non-safety-sensitive positions need not disclose past dependency on alcohol or drugs unless an employer can establish that such a

disclosure is a BFOR. The duty to accommodate, including individualized assistance and consideration, will apply.

Follow-Up Testing

Unannounced periodic or random testing may be permissible, following disclosure of a current drug or alcohol dependency or abuse problem, as long as it is tailored to individual circumstances and is part of a broader program of monitoring, rehabilitation and support. Usually, the designated rehabilitation provider will determine whether follow-up testing is necessary for a particular individual.

Fitness-for-Duty Testing

The Commission supports the use of functional performance testing, where such methods exist, to assess impairment. When minimally intrusive, reliable tests of impairment capable of giving an accurate and meaningful result generally become available, it might be feasible and acceptable to test safety sensitive employees for impairment — whether from drugs, alcohol, anxiety, and stress or fatigue. If standardized tests are employed, care must be taken to ensure that testing methods do not have any inherent biases, for example against women or visible minorities.

Cross-Border Trucking and Bus Operations: A SPECIAL CASE

Canadian trucking and bus companies wishing to do business in the U.S. may be required to develop drug- and alcohol-testing programs to comply with U.S. regulations (See Appendix). Nevertheless, these programs must respect Canadian human rights law.

Canadian human rights law takes a different approach to the U.S. on the issue drug testing — not because protecting the rights of those who abuse drugs or alcohol is considered more important than public safety, but because drug testing has not been shown to be effective in reducing drug use, work accidents or work performance problems.

However, for trucking and bus businesses that operate exclusively or predominantly between Canada and the U.S., not being banned from driving in the U.S. may be a *bona fide* occupational requirement, provided the company can produce evidence that its continued employment of banned drivers would constitute an undue hardship.

Drivers who are denied employment opportunities or who face disciplinary or other discriminatory employment consequences in Canada as a result of the imposition of the U.S. rules will still have a right to file a complaint with the Canadian Human Rights Commission on the ground of real or perceived disability.

Drivers who, on the basis of individualized assessment, have been proven to be substance-dependent, must be accommodated by their employer in accordance with Canadian law and jurisprudence.

Upon successful completion of evaluation, treatment and rehabilitation, drivers may be considered for appropriate employment, including reassignment to Canada-only routes, unless doing so would constitute an undue hardship.

If a driver tests positive for drugs or alcohol and is determined not to be substance-dependent, the driver should be returned to his or her position, if possible, and appropriate disciplinary action may be taken. Termination may only be justified where there is just cause and appropriate disciplinary steps have been taken.

Policy Requirements

Accommodation

In the limited circumstances in which testing is justified, employees who test positive must be accommodated by the employer to the point of undue hardship. The Act requires individualized or personalized accommodation measures. Policies that result in automatic loss of employment, reassignment, or that impose inflexible reinstatement conditions without regard for personal circumstances are unlikely to meet this requirement. Accommodation should include referring the employee to a substance abuse professional to determine if in fact he or she is drug-dependent, providing the necessary support to permit the employee to undergo treatment or a rehabilitation program, and considering sanctions less severe than dismissal.

An employer may be justified in temporarily removing an employee with an active or recently active substance abuse problem from a safety-sensitive position. Automatic reassignment is not acceptable.

Once rehabilitation has been successfully completed, the employee should be returned to his or her position. Follow-up testing may be a condition of continued employment where safety continues to be of fundamental importance. Usually, the designated rehabilitation provider will determine whether follow-up testing is necessary for a particular individual. If follow-up testing reveals continuing drug or alcohol use, further employer action, up to dismissal, may be justified.

If the employee is determined <u>not</u> to be substance-dependent, the employee should be returned to his or her position and appropriate disciplinary action may be taken. Appropriate consequences for a breach of an employer's drug or alcohol testing policy depend on the facts of the case, including: the nature of the violation, the existence of prior infractions, the response to prior corrective programs, and the seriousness of the violation.

An employee that requests assistance for an alcohol or drug problem cannot be disciplined for seeking help.

Undue Hardship

The employer will be relieved of the duty to accommodate the individual needs of the alcohol or drug dependent employee if the employer can show that:

1. the cost of accommodation would alter the nature or affect the viability of the enterprise, OR

2. notwithstanding the accommodation efforts, health or safety risks to workers or members of the public are so serious that they outweigh the benefits of providing equal treatment to the worker with an addiction or dependency.

If an employee has problem with drugs or alcohol and it is interfering with that person's ability to perform the essential duties of the job, the employer must provide the support necessary to enable that person to undertake a rehabilitation program, unless the employer can demonstrate that such accommodation would cause undue hardship.

If an employer has reasonable cause to believe an employee is abusing drugs or alcohol or an employee tests positive and refuses treatment, this does not in and of itself constitute undue hardship or justify immediate dismissal of the individual. The employer must demonstrate through progressive discipline that the employee has been warned and is unable to perform the essential requirements of his or her position.

Ensuring Compliance

In addition to the many factors discussed in this policy, the Commission may also consider some of the following elements when reviewing a drug- or alcohol-testing policy.

In the limited circumstances where drug or alcohol testing may be considered a valid requirement of the job:

- Does the employer notify applicants of this requirement at the time that an offer of employment is made? The circumstances under which testing may be required should be made clear to employees and applicants.

- Are drug- or alcohol-testing samples collected by accredited individuals and are the results analysed by a certified laboratory?

- Are procedures in place to ensure that a health care professional reviews the test results with the employee or applicant concerned? All confirmed positive results should be evaluated to determine if there is an explanation for the positive result other than substance abuse. An affected individual or employee should have the right to submit a request to have their sample re-tested by an accredited laboratory should the original results be in dispute.

- Are procedures in place to ensure confidentiality of test results? Any records concerning drug and alcohol tests should be kept in a separate confidential file away from other employee records.

There are many causes of employee impairment besides alcohol and drug use that jeopardize workplace safety, such as fatigue, stress, anxiety and personal problems. The Commission encourages employers to adopt programs and policies that focus on methods of detection of impairment and safety risks, and that are remedial rather than punitive in nature. These would include employee assistance programs, enhanced supervision and observation, and positive peer reporting systems, which focus on rehabilitation rather than punishment. Testing should be limited to determining actual impairment of an employee's ability to perform or fulfill the essential duties or requirements of the job.

This policy has been approved by the Commission and came into effect on June 11, 2002.

References

Applicable Sections of the *Canadian Human Rights Act*

Section 7 reads:

7. It is a discriminatory practice, directly or indirectly,
(*a*) to refuse to employ or continue to employ any individual, or
(*b*) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

Section 10 reads:

10. It is a discriminatory practice for an employer...or organization of employers
(*a*) to establish or pursue a policy or practice, or
(*b*) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

Section 15 reads:

15. (1) It is not a discriminatory practice if
(*a*) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement

15. (2) For any practice mentioned in paragraph (1)(*a*) to be considered a *bona fide* occupational requirement...it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

Appendix

U.S. Department of Transport Regulations

As of July 1, 1997, any Canadian trucking company with drivers assigned to operate commercial motor vehicles in North America have had to comply with U.S. regulations in order to operate in the U.S. These regulations provide that an employer must have in place a workplace drug and alcohol policy and program that includes, among other things, pre-employment drug testing, post-accident testing, reasonable suspicion testing, return-to-duty testing, follow-up testing, as well as random drug and alcohol testing at a minimum rate of 25% of the driver pool for alcohol and 50% for drugs.

These regulations have applied to U.S. trucking companies since 1990; however, an exemption was provided for foreign carriers and drivers since it was anticipated that Canadian law would provide for the prevention of substance abuse in the transportation industry along the same lines as its U.S. counterpart. When the Government of Canada announced in December 1994 that it would not be proceeding with such legislation, the foreign carrier exemption was lifted from the U.S. regulations.

The requirements under the U.S. regulations are extensive. For instance, drivers are prohibited from using alcohol for 4 hours prior to duty and from having a blood alcohol level of .04 or greater while on duty. Employers are required to: provide education for supervisors and access to assistance for employees; on hiring any driver, to obtain from previous employers, with the driver's consent, the drug-testing history for the past two years; to remove from duty any driver who has violated the rules; and to maintain specified records. Employers or drivers who violate the requirements may be subject to enforcement action, including being declared out of service, and being fined up to $10,000 per violation. Enforcement is carried out by means of random company audits.

Approximately 60% of exports and 80% of imports in trade with the U.S. move by truck. An estimated 16,500 Canada-based motor carriers and owner-operators are currently

registered to operate in the U.S. They employ approximately 40,000 drivers and operate107,000 trucks. These motor carriers are all subject to U.S. Department of Transport substance-testing requirements.

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